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Supreme Court, U.S.
FILED

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No. _____

# In the Supreme Court of the United States

TINA ARMSTRONG,

*Petitioner*,

v.

La QUINTA INNS, INC.,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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39 pp

## QUESTIONS PRESENTED

I. MAY PROPERLY AUTHENTICATED POLICE REPORTS BE ADMITTED AS BUSINESS OR PUBLIC RECORDS PURSUANT TO FED. R. EVID. RULE 803(6) AND (8).

II. MAY A LAY WITNESS TESTIFY REGARDING A STANDARD OF CARE VOLUNTARILY ASSUMED BY HIS EMPLOYER PURSUANT TO FED. R. EVID. RULE 701.

## PARTIES TO THE PROCEEDING

### Petitioner

Petitioner Tina Armstrong is an individual currently residing in Yuma Arizona; Ms. Armstrong has no corporate affiliations.

### Respondent

Respondent La Quinta Inns, Inc., is a Delaware Corporation which is wholly owned subsidiary of the La Quinta Company, a Delaware Corporation. The La Quinta Company is a wholly owned subsidiary of Meditrust Operating Company, a Delaware corporation. Meditrust Operating Company, together with Meditrust Corporation, comprise a paired-share real estate investment trust (REIT) which is publicly traded on the New York Stock Exchange under the symbol "MT".

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## OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth circuit is not reported. A copy of the Order and Judgment is included in the Appendix at Appendix A at 1a. The Order filed July 13, 2001 of the Tenth Circuit denying the petition for rehearing is included in the Appendix at Appendix B at 5a. The Memorandum Opinion of the District Court for the District of New Mexico is not reported. A copy of the Memorandum Opinion is included in the Appendix at Appendix C at7a.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order and Judgment on June 15, 2001. Petitioner filed a timely Petition for Rehearing, which the United States Court of Appeals denied by Order filed July 13, 2001. This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28U.S.C.§§ 1254 (1) and 2106.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### FED. RULES EVID. RULE 701

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

### FED. RULES EVID. RULE 803

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (6) **Records of Regularly Conducted Activity.**-A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902 (11), Rule 902 (12), or a statute permitting

certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the source of information or other circumstances indicate lack of trustworthiness.

## FED. RULE EVID. RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

**(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular

possession thereof, or the Panama Canal Zone, or the Trust territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

**(4) Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

**(11) Certified Domestic Records or Regularly Conducted Activity.-** The original or a duplicate of a domestic record of a regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record-

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under the paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

## STATEMENT OF THE CASE

Tina Armstrong was brutally raped, sodomized, assaulted and robbed in her second floor room at a La Quinta Hotel shortly after arriving as a guest. The rapist was able to force his way into Ms. Armstrong's second floor room in broad-day light. The rapist has never been caught. He was able to enter the hotel grounds without being seen by anyone from La Quinta. The rapist was able leave the hotel without anyone from La Quinta seeing, stopping or apprehending him. The La Quinta in question is just off a busy interstate highway. It is an exterior corridor, three story hotel with approximately one hundred and twenty nine rooms. There were no limitations on public access to the property. Anyone could enter the premises twenty-four hours a day, seven days a week.

La Quinta had established a security policy manual. The head of corporate security for La Quinta who had written the manual was deposed by Ms. Armstrong's attorney. In his deposition he stated that La Quinta had an obligation to use reasonable care to protect Tina Armstrong. The Court disallowed the testimony as calling for a "legal conclusion". Mr. Devine had been with La Quinta as corporate director of security and safety for over five years. This testimony was crucial to Ms. Armstrong in establishing a duty of care by La Quinta.

In addition, Ms. Armstrong attempted to submitted fourteen different police reports from the Amarillo Police Department regarding criminal activities in the same block as the La Quinta in question. The police reports were all under the seal of the Amarillo Police Department and attached to an affidavit from the custodian of records. These police reports were tendered to show foreseeability of criminal activity

including rape on La Quinta's own property. The Court rejected the tendered police reports.

## ARGUMENT FOR GRANTING WRIT

### *I. MAY PROPERLY AUTHENTICATED POLICE REPORTS BE ADMITTED AS BUSINESS OR PUBLIC RECORDS UNDER FED. R. EVID. RULE 803 (6) AND (8).*

Ms. Armstrong tendered fourteen different police reports from the Amarillo Police Department between 1994 through 1998. Each police report was stamped "certified-Amarillo Police Department, city of Amarillo, Texas." See **FED. R. EVID. Rule 902**. In addition, the affidavit from the custodian of records mirrored the language contained in Fed. R. Evid. 803 (6) and (8).[1] It was crucial to Ms. Armstrong's

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[1] The police reports are summarized:

| Date | Location | Offense |
|---|---|---|
| 04-19-98 | Phillips 66-2209 Coulter | attempted armed robbery |
| 07-08-97 | Days Inn-2102 Coulter | burglary |
| 07-01-97 | Days Inn-2102 Coulter | burglary |
| 06-08-97 | Days Inn-2102 Coulter | burglary |
| 05-27-97 | Days Inn-2102 Coulter | burglary |
| 05-26-97 | Days Inn-2102 Coulter | burglary |
| 05-17-97 | Days Inn-2102 Coulter | burglary |
| 08-03-96 | Phillips 66-2209 Coulter | aggravated assault |
| 12-25-95 | Waffle House/La Quinta | sexual offense |
| 10-19-95 | Comfort Inn-2100 Coulter | armed robbery |
| 10-02-95 | 1-40 and Coulter | armed robbery |
| 12-30-94 | La Quinta | aggravated assault |
| 05-17-94 | Comfort Inn-2100 Coulter | robbery |

case to show that criminal activity had taken place on and around the La Quinta property sufficient to put La Quinta on notice that a rape might take place on its property. See, **Timberwalk Apartments Partners, Inc. v. Cain,** 972 S. W. 3d 749 (Tex. 1998).

The affidavit and attached police reports were admissible under Fed. R. Evid. Rule 803 (8) public records exception. The purpose of the public records and reports exception to the hearsay rule is a practical one. That is, to end the need for constant attendance of public officers in court to prove routine matters. **Gilbert v. Gulf Oil Corp.**, 175 F.2d 705 (4th Cir.1949). An affidavit from the custodian of records is sufficient to lay a foundation for the admission of records. **Wilson v. Zapata Off-Shore Co.,** 939 F.2d 260 (5thCir.1991). See also, **FED.R.EVID. Rule 902 (1) (4) and (11).**

i. ***The affidavit and attached police reports were admissible as a business record.***

The affidavit and police reports were admissible under Fed. R. Evid. Rule 803 (6)-business records. The Third Circuit Court of Appeals has held "that the testimony of the custodian or other qualified witness is not a sine qua non of admissibility ... where the requirements for qualification as a business record can be met by ... affidavits..." **In re Japanese Electronics Products,** 723 F. 2d 238 (3rd Cir.1983). The business record exception to the hearsay rule does not require the presentation of affirmative indicia of trustworthiness other than those explicitly required by the rule

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setting forth the exception. If those are met, the burden of presenting evidence shifts to the party opposing the admission to show indicia of a lack of trustworthiness. **Travelers Ins. Co. v. U. S.,** 46 F.3d 458 (Fed. Cir.2000).

The District Court characterized the police reports as consisting "of statements of witnesses to alleged crimes as recorded by police officers." This is an unfair characterization. The reports all contained a page of statistics regarding the suspects' description, witness names, physical location of the premises et cetera. While, the reports do record some witness statements (which may be admissible under 801 (1) and (2)), the vast majority of the reports consisted of the officers investigation, opinions and conclusions. Public records are not deemed inadmissible because they contain facts, conclusions or evaluations. **Thompson v. Office and Professional Employees Intern. Union,** 74 F.3d 1492 (6thCir.1996). See also, **Beech Aircraft Corp. v. Rainey,** 109 S. Ct. 439, 488 U.S. 153, 102 L.Ed.2d 445 (1988) [factually based conclusions or opinions are not on that account excluded from the scope of the rule which includes public records and reports containing factual findings among the types of statements that are not excludable by the hearsay rule.]

ii. ***The District and Appellate Courts' ignored established Supreme Court precedent***

The District Court excluded the business/public records affidavit as "unreliable". The District court used the wrong standard. Fed. R. Evid. Rule 803 (8) establishes general admissibility unless the record is deemed somehow untrustworthy. **In re Air Disaster at Lockerbie Scotland,** 37 F. 3d 804 (2ndCir.1994). The Court should start from the premise that the records are reliable. **Fayson v. Schmadl,** 126

F.R.D. 419 (D.D.C.1988). Records made by public officials in the ordinary course of their duties have a strong indicia of reliability since public officials are presumed to perform their duties properly and generally lack motive to falsify information. **Felzcerek v. INS,** 75 F.3d 112 (2ndCir.1996). The Supreme court has stated that ordinarily it presumes that public officials have properly discharged their official duties. **Bracy v. Gramley,** 117 S. Ct. 1793, 520 U.S. 899, 138 L.Ed. 97 (1997).

### *iii. The Courts below failed to follow established law regarding the burden of proof.*

The party opposing the introduction of a report under the public records exception must prove that the report is not trustworthy. **Thompson v. Office and Professional Employees Intern. Union,** 74 F.3d 1492 (6thCir.1996). The party opposing, must show untrustworthiness beyond the fact that the declarant is not in court to testify. **Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.,** 805 F.2d 49 (2ndCir.1986). See also, **Montiel v. City of Los Angeles,** 2 F.3d 335 (9thCir.1993) [District court should presume that an ad hoc report on the police department was trustworthy and shifted the burden of establishing its untrustworthiness to the city].

Federal courts have repeatedly admitted police reports into evidence. See, **Simmons v. Chicago and Northwestern Transp. Co.,** 993 F.2d 1326 (8thCir.1993); **Wilson v. Beebe,** 770 F. 2d 578 (6thCir.1985); **Perrin v. Anderson,** 748 F.2d 1040, (10thCir.1986); **State Farm Mut. Auto Ins. Co. v. Brown,** 767 F.Supp. 1151 (1991). Both the District Court and the Tenth Circuit Court of Appeals failed to follow precedent established within the Tenth Circuit and other

Circuits related to admissibility of police reports without a testifying witness.

The District Court found that "a substantial portion of many of the reports had been redacted." However, the only redactions were witness names and other identifying information. The redaction did not make the police reports untrustworthy. The redaction went to the weight not to admissibility. **Fayson v. Schmadl, supra.**

Finally, the District Court mistakenly held that because "Defendant admitted it had never heard of any of the crime reported, the only probative value of such reports is as proof that the crimes reported actually occurred." First, counsel for La Quinta claimed to have "never heard of the crimes". However, at least one of its employees testified by deposition as to have remembered the armed robbery at the Phillips 66 down the street from La Quinta. Secondly, under Texas law, evidence of prior crime near the property is probative of foreseeability. Foreseeability is determined "in light of what the premises owner knew or should have known before the criminal act occurred." **Timberwalk, supra.** at 757.

There was a factual issue whether La Quinta should have known about this serious criminal activity in the same block as La Quinta. Criminal activity within the same block as La Quinta was relevant and admissible. La Quinta should have known about these crimes occurring in its same block, some right next door. The United States Supreme Court has held that the basic standard of relevance under the Federal Rules of Evidence is a liberal one. **Daubert v. Merrell Dow Pharmaceuticals, Inc.,** 113 S.Ct. 2786, 509 U.S. 579, 125 L.Ed.2d 469 (1993). Yet the District Court and the Appellate

Court took a narrow, and constrained view of the relevancy of the official police records.

*iv.* ***The Courts failed to follow well-established authority by deeming police reports and records inadmissible evidence.***

The Third Circuit has held it was error to exclude police reports offered by a Defendant, where the prosecution did not show the officer had "any reason not to be accurate in setting out what he knew in his police report." **U.S. v. Versaint,** 849 F.2d 827, 832 (3rdCir.1988). A report by an officer in the ordinary course of business based on the information supplied by a complaintant is admissible. **Rosario v. Amalgomated Ladies Garment Cutters' Union Local 10,**605 F.2d 1228, 1250-51 (2ndcir.1979), *cert. denied,*446 U.S. 919 (1980). See also, **FAA v. Landy,** 705 F.2d 624, 632 (2ndcir.1983) [telex by German government to FAA admitted as incorporated in FAA's factual findings resulting from investigation made pursuant to lawful authority].

***ISSUE II: MAY A LAY WITNESS TESTIFY REGARDING A STANDARD OF CARE VOLUNTARILY ASSUMED BY HIS EMPLOYER PURSUANT TO FED. R. EVID. RULE 701.***

Mr. Patrick Devine was the corporate director of security and safety for La Quinta. Mr. Devine was primarily responsible for writing the La Quinta security manual. The security policy was put into effect in December 1995. He testified during Ms. Armstrong's case in chief by deposition.

Mr. Devine was asked by counsel "Is it your opinion you were responsible to use reasonable care to protect Tina Armstrong from the assaults of third parties ?" La Quinta's counsel objection on the basis that the question called for a "legal conclusion." Counsel's question was referring to policies of La Quinta, not legal conclusions. Mr. Devine's answer recorded in the deposition was:

> *Q. Is it your opinion that you were responsible to use reasonable care to protect Tina Armstrong from the assaults of third parties?*
> *A. I'm sorry. Meaning was La Quinta responsible to use reasonable measures?*
> *Q. Yes, sir. When I use 'you'. I'm referring to La Quinta.*
> *A. Yes I do.*
> *Q. Not you personally?*
> *A. Yes I do, reasonable measures.*

Ms. Armstrong's counsel was not requesting a "legal opinion" but instead was asking the Corporate Security

Director what La Quinta's policies were based on using his own personal knowledge and observations as Security Director. A witness experienced in technical matters and qualified to do so may give his opinion as to the cause of matters even though it may involve an ultimate fact to be finally decided by the jury. **Dickerson v. Shepard Warner Elevator Co.,** 287 F.2d 255 (6thCir.1961).

The testimony was crucial to Ms. Armstrong's case in establishing a voluntary duty assumed by La Quinta. Further, it was pertinent for impeachment to rebut La Quinta's claim that it owed no duty to Ms. Armstrong to prevent her rape while a paying guest at the La Quinta Hotel. **Dugan v. EMS Helicopters, Inc.,** 915 F.2d 1428 (10thCir.1999); **Murrey v. U.S.,** 73 F .3d 1445 (7th Cir. 1996). The modern trend is to admit lay opinion testimony. **Joy Mfg. Co. v. Sola Basic Indus., Inc.,** 697 F.2d 104, 110 (3rdCir.1982). Indeed, the Advisory Committee Notes indicates "[t]he basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." **Fed.R.Evid. Advisory Committee Notes to Rule 704.**

A lay witness may offer an opinion if it is helpful to a clear understanding of his testimony or the determination of a fact in issue. **Magna Trust Co. v. Illinois Cent. R.G.,** 728 N.E.2d 797 (Ill. App.2000). An opinion is "helpful to the trier of fact", within the meaning of Rule 701,if it aids or clarifies an issue that the jury would not otherwise be as competent to understand. As long as the circumstances can be presented with greater clarity by stating an opinion, then the opinion is helpful to the trier of fact. **Lauria v. Nat. Railroad Passenger Corp.,** 145 F.3d 593 (3rd Cir.1998). Further, lay opinions of a technical nature may be admitted when the witness possesses sufficient and relevant specialized

knowledge or experience to offer an opinion. **Hulmes v. Honda Motor Co., Ltd.,** 960 F.Supp. 844 (D.N.J.1997).

*i.* ***The Courts ignored well-established precedent within the Tenth Circuit and other circuit courts by disallowing the testimony.***

The Tenth Circuit court of Appeals has previously allowed a lay witness to testify regarding the standard of care and causation in several instances similar to the present case. In **Weese v. Schukman,** 98 F.3d 542 (10thCir.1996), it was held that a physician in a medical malpractice case arising from treatment for carbon monoxide poisoning, who was not an expert in carbon monoxide poisoning was allowed to testify as a lay witness. The Court held that the opinions were based on his experience as a physician and were clearly helpful to an understanding of his decision making process.

In another Tenth Circuit case, the Circuit Court held that a witness could testify to the safety of a vestible at the time of the accident because it was rationally based on perception of a lay witness and helpful to a clear understanding of the witnesses testimony. **Getter v. Wal-Mart Stores, Inc.,** 66 F.3d 1119, *certiorari denied,* 516 U.S. 1146 (10th Cir.1995). Finally, the Tenth Circuit has held that it was permissible for a law enforcement officer to give lay testimony based on "his experience" as to "whether, in his opinion, going into a building was a 'search'". **Specht v. Jensen,** 832 F.2d 1516, 1526 (10thCir.1987) *remanded on other grounds,* 853 F.2d 805 (10th Cir. 1988), *cert. Denied,* 488 U.S. 1008 (1989).

*ii.* ***The Court ignored well-established authority from other Circuits' allowing such lay opinion testimony.***

Lay testimony similar to Mr. Devine's has been accepted by the Courts in numerous federal cases. For example, the Second Circuit Court of Appeals has allowed a lay witness to testify that "age discrimination" was involved in the company's termination of an employee based on his "intimate involvement" with the Company's operations and decision-making process. **Lightfoot v. Union Carbide Corp.,** 110 F.3d 898, 911-912 (2ndCir.1997). In **Samples v. Atlanta,** 846 F.2d 1328 (11thCir.1988), a longtime employee of the police department testified in a civil rights action that, in his opinion, the police department had an unwritten policy or practice of encouraging police brutality. In the case of **Slayton v. Ohio Dept. of Youth Services,** 206 F. 3d 669 (6thCir.2000), the testimony of supervisors was held not impermissible lay opinion. The supervisor testified that the condition of an employee's co-worker repeatedly playing rap music constituted sexual harassment in violation of the agency's policies. The statement was related to the employer's policies and not the law.

The Eighth Circuit Court of Appeals held as a permissible lay opinion a railroad executive's testimony that in their opinion trains with cabooses were no safer than cabooseless trains. The opinion was based on supervising railroad operations, years of experience in the industry, and a review of employee accident records prepared in the ordinary course of business. **Northern R. Co. v. State of Neb.,** 802 F.2d 994 (8thCir.1986). The Eighth Circuit has also held that personal knowledge or perceptions based on industry experience is a proper foundation for lay opinion or inference testimony. **Wactor v. Spartan Transp. Corp.,** 27 F.3d 347, 350 (8thCir.1994). Testimony may use words with

compatible legal and lay meanings. **U.S. v. Misle Bus.& Eq. Co.**, 967 F. 2d 1227, 1234 (8thCir.1992).

The individual experience and knowledge of a lay witness may establish his competence without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge. **Randolph v. Collectramatic, Inc.,** 590 F.2d 844 (10thCir.1979). Ms. Armstrong was attempting to establish that the security policies voluntarily implemented by La Quinta established a duty of care to her.

The security manager, Mr. Devine, had been primarily responsible for writing the security manual. He had personal knowledge of what La Quinta's policies and practices were. The question asked by counsel did not impermissibly call for a legal conclusion, but was directed at La Quinta's own voluntarily established duty of care. The opinion was appropriate pursuant to Fed. R. Evid. Rule 701. The United States Supreme Court has long allowed lay opinions based upon personal knowledge. **Connecticut Mut. Life Ins. Co. v. Lathrop,** 4 S.Ct. 533, 111 U.S. 612, 28 L.Ed. 536 (1884). [lay opinion testimony regarding insanity allowed].

## CONCLUSION

The Court of Appeals decision upholding the District Court is not consistent with other Circuits opinions regarding the admissibility of lay opinion testimony and business/public records.

Respectfully Submitted:

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**No. 00-2212**

**[Filed: June 15, 2001]**

TINA ARMSTRONG,
*Plaintiff-Appellant*,

v.

LA QUINTA INNS, INC.,
a Delaware corporation,
*Defendant-Appellee*.

**JUDGES:**

SEYMOUR, BRORBY, and BRISCOE, Circuit Judges.

Appeal from the United States District Court
of New Mexico
Bruce D. Black, District Judge
Case No. CIV-99-531-BB/LFG

OPINION BY: Wade Brorby

## OPINION:

## ORDER AND JUDGMENT*

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In this diversity case, plaintiff Tina Armstrong is appealing the district court's entry of judgment in favor of defendant La Quinta Inns, Inc. under Fed. R. Civ. P. 50(a). Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

Plaintiff checked into a La Quinta Inn in Amarillo, Texas, on the afternoon of June 28, 1998. Plaintiff alleges that, after she located her room and was leaving the room to return to her car to get her luggage, an unknown man pushed her back into the room and sexually assaulted her. Plaintiff subsequently filed a diversity action against defendant in the United States District Court for the District of New Mexico. Plaintiff asserted a premises liability claim against defendant under Texas law alleging that defendant was negligent in failing to provide adequate security at the hotel and that

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

defendant's negligence was a cause of the sexual assault.[1]

Plaintiff's case proceeded to trial before a jury on June 7, 8, and 9, 2000. At the conclusion of plaintiff's case-in-chief, the district court found that no reasonable juror could conclude, under Texas law, that defendant should have foreseen that a sexual assault or other similar violent crime was likely to occur at the hotel. Relying on the decision of the Texas Supreme Court in *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), the district court therefore granted defendant's motion under Fed. R. Civ. P. 50(a) for judgment as a matter of law.

Plaintiff argues on appeal that she put forth sufficient evidence of prior criminal activity, both at the hotel and in the immediate vicinity, to establish a prima facie case of foreseeability under *Timberwalk*. We have conducted a de novo review of the district court's decision to grant defendant judgment as a matter of law, and we affirm for substantially the same reasons set forth in the district court's memorandum opinion dated June 13, 2000.[2]

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[1] Because the district court's jurisdiction is based on diversity of citizenship under *28 U.S.C. § 1332*(a)(1), we must apply state law to the substantive issues on this appeal. *See Peck v. Horrocks Eng'rs, Inc., 106 F.3d 949, 952 (10th Cir. 1997)*. The district court applied Texas law to plaintiff's substantive claims, and the parties have not challenged the applicability of Texas law on appeal.

[2] Plaintiff also argues that the district court erred in: (1) refusing to allow her liability expert to supplement his expert report and testify regarding defendant's security manual; (2) refusing to allow into evidence certain deposition testimony from defendant's corporate security director; and (3) refusing to allow into evidence certain deposition testimony concerning drug use on the hotel

Accordingly, the judgment of the United States District Court for the District of New Mexico is AFFIRMED.

Entered for the Court
Wade Brorby

Circuit Judge

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premises in March of 1998. We hold that the district court's evidentiary rulings were not an abuse of discretion.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**No. 00-2212**

**[Filed: July 13, 2001]**

TINA ARMSTRONG,
*Plaintiff-Appellant,*

v.

LA QUINTA INNS, INC.,
a Delaware corporation,
*Defendant-Appellee.*

**JUDGES:**

SEYMOUR, BRORBY, and BRISCOE, Circuit Judges.

## ORDER

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

By: /s/ Deputy Clerk

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**OF NEW MEXICO**

**No. CIV 99-531 BB/LFG**

**[Filed June 13, 2000]**

TINA ARMSTRONG,
*Plaintiff-Appellant,*

v.

LA QUINTA INNS, INC.,
a Delaware corporation,
*Defendant-Appellee.*

**MEMORANDUM OPINION**
**SUPPORTING GRANTING**
**DEFENDANT'S RULE 50 MOTION**

THIS MATTER is before the Court on Defendant's motion for judgment as a matter of law pursuant to Federal Rules of Civil Procedure 50(a), and the Court being duly advised, FINDS the motion is well taken and should be granted.

## DISCUSSION

Plaintiff, Tina Armstrong, checked into the La Quinta Inn located at 2108 South Coulter in Amarillo, Texas, on June 28, 1998. It was approximately 4:30 PM. After Plaintiff located her room and was leaving the room to get her luggage our of her car, she was-pushed back into the room by a man in a green shirt. Plaintiff was sexually assaulted repeatedly and the assailant was never apprehended.

Under Texas law, it is the general rule that "a person has no legal duty to protect another from the criminal acts of a third person." *Timberwalk Apartments Partners, Inc. v. Cain*, 972 S.W. 2d 749, 756 (Texas 1998). The exception is that "[o]ne who controls...premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." *Id.* This legal duty exists, then, only when the risk of criminal conduct is both unreasonable and foreseeable. Whether such a risk was foreseeable cannot be determined in hindsight but rather must be viewed in light of what the premises owner knew, or should have known, before the criminal act occurred. *Id.* at 757. In deciding this issue, the Texas courts require consideration of:

(1) Whether any criminal conduct previously occurred on or near the property;

(2) How recently it occurred;

(3) How often it occurred;

(4) How similar the conduct was to the alleged incident; and

(5) What publicity was given the criminal conduct to indicate that the landowner knew or should have known about it.

*Timberwalk* at 758; *Plowman v. Glen Willows Apartments*, 978 S.W. 2d 612, 617 (Tex. App. 1998); *Kelley v. Wurzbach*, 1999 WL 33640 at *3 (Tex. App.).

Plaintiff failed to put on sufficient evidence to demonstrate that La Quinta knew or should have known of the risk that Plaintiff would likely be the victim of a violent criminal activity on La Quinta's property. *See Walker v. Harris*, 924 S.W. 2d 375 (Tex. 1996). Indeed, the only admissible evidence that Plaintiff produced was that three or four televisions, and some personal belongings had been stolen from rooms on the property more than one year before this sexual assault.

Plaintiff attempted to subpoena Amarillo, Texas, police officers to testify as to other crimes in the vicinity, but the City of Amarillo moved to quash the subpoenas. Since Amarillo is obviously not within New Mexico and is more than 100 miles from the place of trial, the Court was required to quash those subpoenas. Fed R. Civ. P. 45; *see also* 28 Fed. Proc., L.Ed. § 65:278. Plaintiff's counsel then attempted to move the Amarillo police reports into evidence by attaching an affidavit of Milton Pool, an Amarillo police officer acting as the records custodian.

The Court found these records could likely overcome Defendant's authentication challenge under Federal Rule of Evidence 902,[1] however, Defendant also raised a hearsay challenge. In response, Plaintiff relied primarily on Federal Rule of Evidence 803(6), the business record exception.[2] While the United States Supreme Court has adopted an amendment to Rule 803(6) which would potentially permit the use of such an affidavit, the present language requires "the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness." (Evidence Rules Committee Commentary p. 8 contained in House Doc. 106-225 (2000) conveying the proposed amendments to Congress).[3] *But See, In re Japanese Elec. Prods. Antitrust Litig.*, 723 F. 2d 238 (3d Cir. 1983), *rev'd on other grounds, Matsushita Elec. Indus. co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The problem with applying the proposed amendment in the present case, however, was the quality of the underlying records. They consisted of the statements of witnesses to alleged crimes as recorded by police officers. While it is difficult to determine from their face, in some instances the officers apparently thought such statements suspect and engaged in no further investigation. Morever, a substantial portion of many of the reports had

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[1] *See Hunt v. Liberty Lobby*, 720 F. 2d 631 (11th Cir. 1983), and *United States v. M'Biye*, 655 F. 2d 1240 (D.C. Cir. 1981).

[2] Plaintiff also attempted to raise Federal Rule of Evidence 803 (1) present sense impression and (2) excited utterance, but had no legal authority, and the Court was unable to comprehend the applicability of these provisions.

[3] The Supreme Court also adopted and conveyed to Congress a related amendment to Federal Rule of Evidence 902.

been redacted. Under these circumstances it would have been difficult for Plaintiff to rely on, and more particularly for Defendant to challenge, the incidents reported under *Timberwalk*. Since Defendant admitted it had never heard of any of the crimes reported, the only probative value of such reports is as proof that the crimes reported actually occurred. Without a witness to testify as to the reports, however, they lacked sufficient reliability to satisfy the *Timberwalk* requirements. *See Wilson v. Zapata Off-Shore Co.*, 939 F. 2d 260 (5th Cir. 1991) (unreliability is a basis for exclusion of business records).

Under Texas law, Plaintiff had the burden of introducing "strong" evidence that the risk of criminal conduct on La Quinta's property had reached a sufficient level Plaintiff's sexual assault was "likely." *Timberwalk* at 757. At the close of Plaintiff's case there was no evidence from which a reasonable juror could conclude that sexual assault was likely. The only evidence of even an arguably similar crime was the incident in the adjoining Waffle House parking lot 26 months earlier. However, Plaintiff had no one who could describe the *Timberwalk* criteria as to this incident or any of the other crime reports in the neighborhood to the Court or jury. *Timberwalk* and *Walker* require the Rule 50(a) motion be granted.

Dated at Albuquerque this 13th day of June, 2000.

/s/ Bruce D. Black
BRUCE D. BLACK
United States District Judge

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